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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 694

ISAAC TRAININ,

Petitioner,

against

DAVID E. CAIN, Commanding Officer of Camp Upton.

PETITION FOR REHEARING

OSMOND K. FRAENKEL,
Counsel for Petitioner.

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

1. Petitioner's application for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit was denied by this Court on January 8, 1945.

2. Among the grounds on which that application was based was the question of the quantum of proof necessary to justify action by a draft board. The Circuit Court held that such action must be upheld if based on "any" evidence, expressly recognizing that other Circuits had applied to draft board orders the "substantial evidence" rule by which administrative action is generally tested. This Court is now being asked, in *Bridges* v. *Wixon*, No. 788 of this Term, to consider the quantum of proof properly applicable to deportation proceedings. In view of the fact that the Circuit Court in the case at bar rested its decision in large part on its belief that the substantial evidence rule was not applicable to deportation proceedings, petitioner respectfully urges that, if this Court grant the application

for a writ in the *Bridges* case, it reconsider its denial of the application in the case at bar, so that the question of the proper quantum of proof be considered by it with regard to draft cases as well as deportation proceedings.

3. Petitioner had grounded his application also on denials of due process by the draft board and the courts below. Two such denials are so destructive of orderly administrative and judicial processes that petitioner can hardly believe that this Court means to condone them. And if they are not to be condoned they should be rebuked and petitioner given a new administrative hearing free from taint.

Petitioner refers first to the use of the panel as "expert" witnesses against him when the panel expressed no opinion to the draft board on the technical issues in the case and the opinion which it did express was not made known to petitioner—and was, indeed, not known to the draft board when it reclassified petitioner and was never known to the appeals board. Petitioner refers also to the use in evidence against him in the District Court of this so-called opinion of the panel and of two other documents, none of which were before the draft board when it reclassified petitioner, none of which were ever seen by the appeals board. It is inconceivable that an American court should uphold administrative findings on the basis of evidence not considered by the administrative agency and sanction a deprivation of liberty on the basis of evidence which the person affected had no opportunity to meet. Yet unless this Court reconsider its previous action and grant the application for rehearing this will have been accomplished.

WHEREFORE, petitioner respectfully asks for a rehearing of the application for certiorari herein, which counsel certifies is presented in good faith and not for delay.

January 19, 1945.

OSMOND K. FRAENKEL,
Counsel for Petitioner.